

LAWRENCE G. WASDEN
Attorney General

DARRELL G. EARLY
Deputy Attorney General
Chief, Natural Resources Division

ANN Y. VONDE (ISB #8406)
MICHAEL C. ORR (ISB #6720)
Deputy Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010
michael.orr@ag.idaho.gov
Telephone: 208-334-4154
Facsimile: 208-854-8072

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JUL 31 2019
Department of Water Resources
Eastern Region

*Attorneys for the Idaho Department of Fish and Game
and the Idaho Water Resource Board*

**BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION)
FOR PERMIT NO. 74-16187 IN THE)
NAME OF KURT W. BIRD and)
JANET E. BIRD)
_____)

JOINT MOTION BY IWRB
AND IDFG FOR OFFICIAL
NOTICE OF DOCUMENTS
ON FILE WITH IDWR
UNDER WATER RIGHT NO.
74-15613

The Idaho Water Resources Board ("IWRB") and the Idaho Department of Fish and Game ("IDFG"), by and through their counsel of record, and pursuant to the *Notice of Hearing and Scheduling Order* (Apr. 23, 2019) ("*Scheduling Order*") and Rules 260, 565, and 602 of the Rules of Procedure of the Idaho Department of Water Resources, hereby jointly move the Hearing Officer to take "Official Notice" in this case of certain documents on file with the Department under water right no. 74-15613 (F. James Whittaker and Paula J. Whittaker) ("the Whittaker case"). The specific documents that are the subject of this motion are the documents individually identified in the *Affidavit of*

Michael C. Orr in Support of Joint Motion for Partial Summary Judgment (“*Orr Aff.*”), filed herewith, as **Exhibits 152—182**. The *Orr Aff.* is incorporated into this motion by this reference as if set forth in full.

Rule 602 of the Department’s Rules of Procedure provides that “[o]fficial notice may be taken of any facts that could be judicially noticed in the courts of Idaho and of generally recognized technical or scientific facts within the agency’s specialized knowledge.” Judicial notice in Idaho courts, in turn, is governed by Rule 201 of the Idaho Rules of Evidence, which provides that Idaho courts may take judicial notice of “records, exhibits, or transcripts from a court file in the same or a separate case” provided they are specifically identified. IRE 201(c)(2). It follows that Rule 602 authorizes the Department to take official notice in this case of records in the Department’s files for other cases, provided the documents are individually identified.

The documents in question are in the Department’s file in the Whittaker case, and are individually identified in the *Orr Aff.* They consist of orders issued by Department, and certain exhibits submitted into the record by the IDFG. These documents are relevant in this case for reasons discussed in the *Joint Motion by IWRB and IDFG for Partial Summary Judgment*, filed herewith and incorporated herein by this reference as if set for the in full.

In brief, this case involves an application to divert “high flows” from Big Timber Creek, and so did the Whittaker case. As such, the Whittaker case raised the question of “local public interest” in efforts to protect and recover ESA-listed fish species¹ and their habitat in Big Timber Creek and the Lemhi Basin. The documentary record on this question was developed in the Whittaker case, and the Department’s analysis and resolution of the “local public interest” question relied in large part on that record. *See generally Joint Motion by IWRB and IDFG for Partial Summary Judgment.*

¹ Fish species listed under the Endangered Species Act.

The Department in reviewing the application in this case recognized that it also implicates the question of the “local public interest” in efforts to protect and recover ESA-listed fish species. Letter from Pamela S. Skaggs, Manager Water Rights Section, to Kurt W & Janet E. Bird (Oct. 30, 2018).² In addition, the Hearing Officer recognized the potential nexus between the Whittaker case and this case by taking official notice of water right no. 74-15613. *Notice of Hearing and Scheduling Order* at 3.

For the reasons discussed above and in the *Joint Motion by IWRB and IDFG for Partial Summary Judgment*, the IWRB and the IDFG request that the Hearing Officer take official notice, pursuant to Rule 602 of the Department’s Rules of Procedure, of the documents on file with the Department under water right no. 74-15613 that are individually identified in the *Orr Aff.* as **Exhibits 152—182**.

DATED this 30th day of July, 2019.

LAWRENCE G. WASDEN
Attorney General

DARRELL G. EARLY
Deputy Attorney General
Chief, Natural Resources Division


MICHAEL C. ORR
Deputy Attorney General

² This letter is part of the included in the “Permit Application through Legal Notice & Request for Comment Letters,” a copy of which is attached as Exhibit 151 to the *Orr Aff.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 30th day of July 2019, I caused the original of the foregoing to be filed with the Idaho Department of Water Resources, and copies to be served upon the following, in the manner listed below:

1. Original to:

| | |
|---|--|
| JAMES CEFALO IDAHO DEPARTMENT OF WATER RESOURCES 900 N. SKYLINE DR., STE A IDAHO FALLS, ID 83402-1718 | <input type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: 208-525-7177 <input checked="" type="checkbox"/> Email: james.cefalo@idwr.idaho.gov |
| | |

2. Copies to the following:

| | |
|--|---|
| IDAHO DEPARTMENT OF WATER RESOURCES ATTN: JEAN HERSLEY, TECHNICAL RECORDS SPECIALIST II 322 E. FRONT STREET, SUITE 648 BOISE, ID 83720-0098 | <input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: |
| ROBERT L HARRIS HOLDEN, KIDWELL, HAHN & CRAPO PLLC 1000 RIVERWALK DR., STE 200 P.O. BOX 50130 IDAHO FALLS, ID 83405 | <input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: <input checked="" type="checkbox"/> Email: rharris@holdenlegal.com |
| MARIE CALLAWAY KELLNER MATTHEW A NYKIEL IDAHO CONSERVATION LEAGUE P.O. BOX 2308 SANDPOINT, ID 83864 | <input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express <input type="checkbox"/> Facsimile: <input checked="" type="checkbox"/> Email: mkellner@idahoconservation.org mnykiel@idahoconservation.org |
| TRAVIS L THOMPSON BARKER ROSHOLT & SIMPSON LLP 163 SECOND AVE WEST | <input checked="" type="checkbox"/> U.S. Mail, postage prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Federal Express |

P.O BOX 63
TWIN FALLS, ID 83303-0063

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☒

Facsimile:
Email: tlr@idahowaters.com


MICHAEL C. ORR